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Poullet, Yves

Published in:
Telematics and Informatics

Publication date:
1998

Document Version
Publisher's PDF, also known as Version of record

[Link to publication](#)

Citation for pulished version (HARVARD):
Poullet, Y 1998, 'Freedom and information highways or how to ensure electronic democracy', *Telematics and Informatics*, vol. 15, no. 3, pp. 163-180.

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PERGAMON

Telematics and Informatics 15 (1998) 163–180

TELEMATICS
and
INFORMATICS

Freedom and information highways or how to ensure electronic democracy¹

Yves Poulet

*Faculty of Law, Directeur of the Centre of Computer and Law Research, Namur University, Facultés
Universitaires Notre-Dame de la Paix, Namur, Belgium*

1. Introduction

The information highways can be defined as new media, in the sense of communication infrastructures; these are networks of every kind (cables, optical fibres, satellites, electromagnetic waves) which, due to their considerable transport capacity further reinforced by techniques known as compression, allow the almost unlimited transmission of data, voices and images in digital form. These highways appear as a vector of democracy so much so that their development leads us to foresee a great increase in the free expression of each person and a search, via multiple networks, for consensus.

In a recent article, Berleur (1995)² defined democracy as: “the creation, the institution of political liberty³ insofar as it is conceived as the link between individual freedom and the will to live together, in a universalizing horizon allowing everybody access to it”. Following Habermas⁴, the author insists on the need to recognize public spaces where the freedom of each person must be upheld in open and transparent debate. In the light of such conditions, the highways of the kind that Internet

¹ The present text explores a number of ideas contained in the report “*Des autoroutes de l’information à la ‘démocratie électronique’ – De l’impact des technologies de l’information et de la communication sur nos libertés*”, report presented to the Council of Europe on 29th and 30th October 1995 by C. Lamouline and Y. Poulet Nemesis, Brufont, 1996.

² J. Berleur, Self-regulation and democracy in the Cybercommunity: What limits?, in: Proceedings of the 4th National Computer Ethics Conference, Computer Ethics Institute, The Brookings Institution, Washington DC, 27–28 April 1995.

³ On the question of political freedom, we can note Montesquieu’s beautiful definition: “that state of affairs that characterizes a society in which no citizen has reason to fear another citizen”.

⁴ The author refers to the work of Habermas, the philosophical discourse on modernity, Gallimard, Paris, 1988, pp. 428–430.

foreshadows appear the ideal space for discussion where each person finds room to voice his views and to communicate.

The user-friendliness of the networks that can be accessed by a simple computer linked to the network by modem makes it possible henceforth for a large number of people to be involved in electronic exchanges both as transmitters and receivers of messages. This image of society where many are involved contrasts, however, with the development of an oligopolistic market, where large groups endeavour to devise world strategies for the distribution of their products. In the place of free collective expressions we now have one-sided expression controlled by a few “owners” of channels and information systems.

Thus the two worlds seem to confront each other, each of which is possible in the future:

The first, where technology appears, on the one hand, as the mode of expression – some would add “free” – of each and everyone, expression made all the more free by the fact that the author chooses to identify himself or not to identify himself; chooses or does not choose the correspondents with whom he wishes to dialogue and, on the other hand, as the mode of access to the free creations of others wherever they may be in the entire world.

The second, where technology appears as an extraordinary tool in the service of the market, allowing the circuits for producing information to be improved but especially to ideally control its distribution. In this context, the development of software allowing users to be authenticated when accessing transaction and information services, and the creation of centres known as “Trusted Third Parties” that control this access appear as necessary consequences of this second approach.

A recent American article⁵ contrasted in this sense the myths of “cyberspace” and the “superhighway”: the first corresponding to the so-called “libertarian” approach, one that is mainly political and cultural, the expression of a kind of abundant electronic democracy; the second to that based more on the law of the market and the rules of “ownership”. Thus, technology fluctuates between these two worlds: that of freedom and that of ownership.

We shall take into account this ambivalence in the development of information highways in our study where we specify a number of conditions⁶ for electronic democracy. If we want information highways to be vectors of democracy and

⁵ Under the titles “Cyberspace and the American Dream”: “A Magna Carta for the Knowledge Age”, we have in fact the ideas of a dozen authors (in particular those of E. Dyson, G. Gilder, G. Keyworth and A. Toffler), ideas accessible through Internet at the address of the Electronic Frontier Foundation and recently published in Infoways, 1995, p.2 et s.

⁶ We could have focused on other questions, e.g. the threat posed by information highways to national sovereignty at a moment when the networks are allowing the words “invisible money” to be given their full meaning; also those questions linked to State security when faced with electronic crime organized on international networks; finally, questions of cultural pluralism and the defence of minorities.

freedom as opposed to a tool for exercising totalitarian control over our actions, it appears that:

first, particular care should be taken that everyone have access to information highways: this is notably the question of *universal service* (Section 2);
secondly, that the *laws of access to public information* that constitute a prior condition to free expression in a democratic society should be updated in an electronic context (Chapter 2);

Many other questions could have been tackled, e.g. that of respect for individual liberties and in particular for people's private lives, that relating to organized crime using information highways and that of its just repression, as well as that of the limits of freedom of expression.

2. Chapter 1: Access to information highways and universal service

Universal access to the multiple uses of information highways presupposes two essential conditions, one being purely technical, namely the indispensable standardization of networks and services, the other encompassing many aspects in so far as all citizens must be allowed to benefit from the new possibilities being afforded by the new technologies; these different aspects are grouped together under the term "universal service". We shall mainly be concerned with the second point. We would, however, like to be allowed to say a few words on the issue of *standardization*.⁷

Setting up international networks allowing access to a multitude of different services whose usefulness to citizens has been firmly stated, necessitates, in addition to the harmonization of regulations, standardizing technical norms both for the functions of the "transportation" layer, to use the ISO term, and for those relating to upper layers, such as the help functions in selecting data bases, for addressing in the electronic mail services, for image compression, etc.

It is this standardization which will be mainly responsible for allowing the cross-frontier passage of information services, making them interoperable by means of gateways between the different systems thanks to adequate interfaces.⁸ One must then insist on the fact that standardization procedures allow various interests to be represented and taken into account, especially those of residential users.⁹

⁷ This theme is developed elsewhere by Mr. R. Coté.

⁸ Moreover, standardization may also serve other purposes, such as system security, user protection, data integrity, and more generally the quality of the services and products, in particular by specifying minimal norm requirements, accompanied by certification procedures (and, if need be, "labels" of quality).

⁹ Moreover, the consequences of the existence of distinct standardization bodies according to the sectors of activity and notably in the telecommunications and audio-visual sectors need to be evaluated, in order to ensure that this situation does not encourage fragmentary or divided approaches to regulations. At the very least, the coordination of the work of the different bodies must be fully guaranteed.

The claim to intellectual rights (patents, copyrights) by those who may create standards can be a major obstacle to their diffusion and a cost to the users of the standardized products.¹⁰

As stated in the *The Commission's White Paper*¹¹ on growth, competitiveness and employment, the determination to speed up the process of standardization and to make existing mechanisms more efficacious is likely to relaunch the discussions succinctly described and stresses the importance of the issues at stake with respect to standardization.

The theme of *universal service* which has recently appeared on the European scene is of American origin. A quick reminder of the origin of the notion is useful (I) before tackling the many dimensions of this concept which has been described as explosive (II).

2.1. *Universal service: an evolutionary if not explosive notion*

The notion of universal service was born in the United States in the area of telecommunications.

A recent study¹² leads us to distinguish two periods in the history of this concept: borrowed from the American literature where it served initially to justify the private monopoly of A.T.T., the concept was subsequently used to justify both the complete liberalization of the sector and the maintenance of service of general interest. It is this concept of universal service which has recently been adopted in the European literature. A later period gives to this concept a more revolutionary scope and consequently a much wider reach: the National Information Infrastructure Policy defined by President Clinton and Vice-President Gore make it an essential element in order, in a negative way, to overcome the risks of discrimination between the

¹⁰In Europe, the Commission has stated its position on the question of standardization concerning the problem of intellectual rights, both with regard to the respective rights and obligations of the European standardization bodies and the holders of intellectual rights and with regard to the objectives of a European standardization policy, bearing in mind the requirements of community law (competition, non-discrimination). The problem is particularly acute in the area of telecommunications, where the debate is not over despite new rules being adopted by the ETSI. The difficulty of combining the requirements of standardization with those of competition and the need to protect intellectual rights is a considerable one and will have to be resolved rapidly in the light of the first experiences.

¹¹The White Paper on growth, competitiveness and employment, p. 24, p. 118. It is stated even more clearly in the Communication to the European Parliament and the Council, a Consultation relating to the Green Paper on the liberalization of telecommunication infrastructures and cable television networks, 3 May 1995, COM (95) 158.

¹²Y. Poulet, F. van der Mensbrugghe, "Service universel ou public dans la politique européenne des télécommunications", study undertaken as part of a project entrusted to TEPSA by INSUPE, Communications et Stratégies, 1995, p. 11 à 54.

“information haves’ and the information have-nots”, and in order, in a positive way, to allow each citizen to benefit from the information society. It is on this second period that we shall focus more.

2.1.1. *Initial period: universal service and liberalization*

The notion is defined as the obligation to provide a service which is: *universal* (which presupposes access for everyone at an affordable price), *equal* (implying access irrespective of geographical situation) and *continuous*, i.e. characterized by the uninterrupted supply of a given quality.¹³ Used officially for the first time in the “Telecommunications Act” of 1934, the notion of “universal service” served to justify the monopoly – described moreover as natural by the economists – by A.T.T. of the telephone service which at that time was the only telecommunications service: the service of voice transportation, the exploitation of which coincided with that of the infrastructure: “One nation – One network – One service”. On the other side of the Atlantic, this slogan was gradually being questioned at the time that technology, the proliferation of infrastructures and services were destroying the very basis of the monopoly. It is true that liberalization did not exclude the offer of services of general interest to which equal access at a reasonable price was guaranteed by the terms and conditions laid down or the licences issued exclusively to certain operators. Also adopted in recent documents of the European Union, the term universal service, chosen in preference to that of public service, takes on a particular meaning. The choice of the word clearly signifies the break in the link traditionally existing between service of general interest and the public and monopolistic character of the enterprise that it designates.

The rules governing the audio-visual sector in particular but also electro-magnetic telecommunications have always been characterized by monopolies and access controls, both justified by the scarcity of frequencies. The compression and the capacity of networks rule out this argument and allow us to foresee that each person may unrestrictedly express his opinion and dialogue on information highways of unlimited capacity.¹⁴ Thus, it is natural to believe¹⁵ that the new information and communication technologies are leading to access for all. Such is not however the obvious conclusion. An operator may in fact have an interest in granting absolute priority to certain services developed by himself or his subsidiaries.¹⁶ Secondly, we are familiar with regulations of the type “must

¹³Annex to the proposed ruling of the Council on principles relating to universal service in the telecommunications sector, COM (93), 543, final version, 15 November 1993.

¹⁴On this question, read “The message is the medium: the first Amendment on the Information is superhighway”, Harvard law Review, 1994, available on Internet @ Harv.Law.Review.

¹⁵There is also the economic argument according to which the more users there are, the more traffic there will be and consequently increased revenue for the network operators.

¹⁶This argument is all the more relevant since, as we have seen (cf. Introduction), vertical integration is increasing.

carry” giving preference to certain programs, indeed regulations allowing governmental or paragonovernmental bodies to refuse right of access to certain programs in the name of the protection of the cultural interests of the citizens.¹⁷ It is therefore necessary that policies relating to information highways clearly affirm that networks are universally accessible.

This policy finds positive expression both in the clear assertion that a service is universally accessible and that conditions are non-discriminatory and transparent, and in restricting the freedom to fix tariffs and to subsidize, by means of universal services, other services.

“In the pre-multimedia era,” writes Scherer¹⁸ “universal service was comprised in the meaning of the ‘good old telephone service’”. One should no doubt also add the obligations weighing on access to the infrastructure and more recently those of interconnection and interoperability of the networks whose offer is henceforth liberalized. It is in this context that initiatives have been undertaken by the Commission.¹⁹ As noted in a recent document concerning universal service issued by the Commission on 5 September 1995, “in the course of consultation over the Green Paper on Infrastructures”²⁰ a large measurement of agreement emerged regarding the current domain of application of universal service (voice telephone, rented lines), as well as in respect of the principles to be observed in identifying the cost of the universal service and its financing.²¹ These principles have now been taken into

¹⁷We think that the “defence of cultural interests” can be achieved by other means, namely by promoting the local cultural industry and the compulsory access of the local cable programs (on this point, see no 14 below).

¹⁸J. Scherer, *Aspects juridiques du multimédia*, in *La Société face au Multimédia*, Enjeux économiques et culturels pour les Européens, Report, IDATE Foundation, 1995, to appear.

¹⁹Three official texts have been issued by the Commission or Council regarding universal service. They are the following: Communication of the Commission of 15 November 1993, Development of a universal service in a competitive environment – ruling submitted by the Council on principles relating to universal service in the telecommunications sector, COM (93) 543 final version. R 94/C 48/01 of the Council of 7 February 1994, on the principles relating to universal service in the sector of telecommunications, J.O. No C 48/1 of the 16.02.94, called resolution “universal service” and Declaration 94/C 48/06 of the Commission concerning the resolution of the Council on the principles regarding universal service in the telecommunications sector. J.O.No C 48/8 of the 16.02.94, called “universal service” declaration.

²⁰Green Paper of the European Commission on the liberalization of telecommunications infrastructures and cable television networks – Part II: “Une approche commune de la fourniture d’infrastructures de télécommunications au sein de l’ “Union Européenne”, dated 25 January 1995 (COM(94) 682 final version), called “Livre vert infrastructures – part II”. Communication of the Commission of 3 May 1994, “The consultation on the green Paper on the liberalization of the telecommunications infrastructures and cable television networks”, COM (95) 158 final version, entitled “consultation on the green Paper infrastructures”.

²¹The commission prefers the obligations of universal service to be financed by universal service funds, to which “operators and providers of eligible services” could contribute. It should be noted that in the United States the system is different: it is essentially the access charges paid by the interexchange carriers to the local exchange carriers who finance the universal service (cf. in this connection the resolution of 7 February 1994, already mentioned in note 19).

account when interconnecting²² and supplying speech telephony²³ with an open network (O.N.P.). They will also be found in the future proposal regarding the granting of licences.²⁴

Thus, a first dimension of universal service has been affirmed, that which guarantees each individual access to whatever network is chosen and a basic service, namely voice transportation.

2.1.2. 2nd period: Universal service and the fight against discrimination

2.1.2.1. The principle. The National Information Infrastructure Policy of Clinton and Gore brought to the notion of universal service a revolutionary dimension, without for that affecting its definition. The notion of universal service is becoming, in an information society, where access to information is daily increasingly vital, the means of fighting social discrimination.

The consequences of such a positive approach, which bases the development of an information society on the growth of our liberties, brings out the importance and need to redefine universal service, understood no longer as the sole access to technical means of communication (the infrastructure and service for voice transportation), but also as the demand to create and make available information content to which each person must be able to have access. Thus, information could become a part of the notion of universal service, in the light of what is considered “essential” and “vital” to ensure the involvement of citizens in a democratic society. To employ the American expression pertaining to the definition of the policy of the National Information Infrastructure, it is a question of taking care to avoid discrimination between those who have the knowledge and those who do not have it (the “information haves” and the “information have-nots”).

The focus this time is not on being satisfied with access, at affordable prices and in a non-discriminatory fashion, to a network nor even to a service seen from a purely technical angle but on ensuring access to information content.

We are familiar with well-known examples in American politics: access to training, to health care, etc. It is a matter of placing at each and every person's disposal, via telecommunications and in accordance with the various modes pertaining to the service considered, certain services of general interest in order that a two-speed society may be avoided.

²²Directive proposed by the European Parliament and the Council relating to interconnection in the telecommunications sector and to the guarantee of the final universal service and of interoperability in applying the principles of supply of an open network (ONP), COM (95) 379, 19.7.95.

²³It is a question of directive 95/62/CE of the European Parliament and Council of 13 December 1995, relating to the application to supply an open network (ONP) to voice telephony, J.O., No L 321/6, 30 December.

²⁴Directive submitted by the European Parliament and Council concerning a common framework for general authorization and individual licences in the telecommunications sector, Brussels, 14 November 1995, COM (95) 545.

The American assertions reappear in certain European documents, in a still purely prospective manner. Thus, in the document already cited²⁵, the Commission reflects on the issue: “In the context of the information society, each citizen should, in such fields as teaching and training, health care and access to public information, be able to benefit from the new services made available by having recourse to advanced technologies of communication.”

This second concept of universal service understood as a real instrument for promoting the liberties of each individual is, through such reflection, gaining ground in Europe. We must now draw conclusions from this extended concept.

2.1.3. The consequences of the later concept of the notion of universal service

The notion of universal service is exploding and upsetting the order of priorities in regulatory action. Universal service can no longer be seen as the exceptional obligation imposed on one or more operators to set up an open infrastructure, where freely competing offers of service²⁶ may operate: the notion, in its enlarged meaning, requires that its content be positively specified and in an evolutionary way, as also the means of achieving it both from the point of view of possible financing²⁷ as from the restrictions (terms and conditions) imposed in order to attain the objectives likely to achieve it.

This view requires that particular attention be paid to the process by which the content of the concept evolves and overflows, as we have said, beyond the technical and indeed economic spheres to penetrate the social and cultural spheres. It is important that, in this process of specification, all the interested parties are heard, including cultural associations and consumers, and that the specification should be definitively made by the legislative power.²⁸

²⁵Document of reflexion on universal service, 5/9/1995. One can find questions of the same kind in the Green Paper on infrastructures published by the Commission in January 1995.

²⁶We have shown elsewhere (*Vers un service universel d'informations publiques*), PUBLAW report, presented at the DG XIII, 26 June 1995, to appear in D.I.T., 1996) that these obligations corresponded to those of the ONP.

²⁷For us, the notion of universal service does not necessarily involve a deficit nor a competitive market.

²⁸In the United States, the National Telecommunications and Information Agency (NTIA) which became the Global Information Infrastructure Agency, has undertaken to hold public debates on the concept of universal service, which include listening to “groups of public interest”. Generally, and in order to guarantee the development of a national information structure, where universal service plays a key role, the American government has undertaken to “work” with both the world of business, organizations representing workers, the academic world, groups of public interest, Congress and the territorial communities. The coordination of the last-mentioned, both at state level and local level (countries, districts, cities, towns) is essential in order to circumvent the obstacles that may arise and to foresee all forms of differentiated treatment. To the extent that information knows no borders, coordination at international level is also necessary.

Apart from these considerations regarding the process of specifying and setting up the universal service or, to be more accurate, services, how can we further extend this concept? We shall distinguish four areas of application:

- access to techniques of communication;
- access to the cultural store of knowledge so as to allow each person the indispensable minimal mastery of the mines of information that the technique makes accessible;
- access to certain contents notably with regard to updating laws of access to administrative documents: this specific point will be dealt with specifically in point II;
- the improvement, using information and communication technologies, of certain services of general interest whether they pertain to government or not.

Let us develop each of these points

Access to techniques of communication must be clearly seen as evolutionary: in the sense that if the interoperability of networks, the development of broad infrastructures, access today to services of speech telephony and in the near future to services of message certification, constitute a first element of universal service, the creation already achieved in certain States of the United States of Access Community Televisions, which allow each group of interests (consumers, political movements, trade unions, etc.) to have not only access to the cables, but also the necessary training to make audiovisual productions, is already appearing as an element of this universal “infoservice”, applied in this instance to the audio-visual sector.

Tomorrow no doubt, if we want everyone to be able to benefit from the new information services, universal service will have to include so-called generic access services allowing access to sound and image data banks and also universal access, at reasonable prices, to message certification services which could rapidly be seen as essential. We can add that access must be seen as much from the point of view of the operators (interconnexion of networks) and of the suppliers of the content as from that of the users.

The need for an access service defined in an evolutionary way presupposes the intervention of a regulating authority called in to specify the universal service and its characteristics, to foresee the mode of financing and to specify the operators (to the extent that the concession of a universal service to many different operators allows, in addition to the advantages of competition between them, the advantage of a better protection of the “private life” of the users by being able to call on now one, now another of these operators).²⁹

²⁹In this connection, see the article of H.H. Perrot, *The Congress, The Courts, and Computer Band Networks: Answering questions about Access and Content Control*, 38 Vill. L. Review, 1993, p. 319 affirming the importance of alternative networks to ensure freedom of expression.

The so-called cultural dimension of universal service requires a policy for fighting against what we term cultural illiteracy.

More than the cost of equipment, we stress here the “cultural” obstacles (including the language) which prevent certain categories of the population, even certain populations, from using the new technologies. Certain layers of the population (and recent empirical studies have shown that contrary to what is believed, the age criterion is not of paramount importance in this connection) show themselves more unwilling to use technological tools whose complexity they find offputting and whose social milieu excludes them. This finding raises the delicate question of the access of everyone to the possibilities of cultural enrichment and to the facilities provided by the new technologies at a moment when other studies reveal that the need to access electronic information services like those relating to health, employment, transport is greater for the unemployed populations and, generally speaking, for those social classes that are less well off.³⁰

With regard to such obstacles, various national reports stress the need for a determined education policy in secondary schools, and even at the primary level. The use of interactive technologies can be a valuable teaching aid, as well as helping students to master their use. Such education should also comprise teaching how to read images whether they be for advertizing purposes, general information or of any other kind, in order to enable the future user of the new media to be able to “decode” the messages conveyed by the networks.

There is also the value in creating “information centres” open to all, which, moreover, could be set up in public libraries. Local experience testifies to the twofold value of these centres: on the one hand, they allow certain populations who are excluded from access to information services for financial reasons to thus have access at a reasonable price; on the other hand, they stimulate, if need be, direct oral communication between several people gathered together, thus removing the risk of an “isolating” technology where only virtual and individualistic communication is provided.

Subject to what we say in respect of the updating of laws of access to administrative documents, access to certain information content in the United States is already coming to mean different things.

Thus, in certain States, the rule forbidding cable distributors from encoding certain broadcasts judged to be of general interest; in others, the firm obligation for

³⁰In this connection, the conclusions of the study of the US Department of Commerce, *Falling through the Net: A Survey of the “Have Nots” in Rural and Urban America*, July 1995: “NTIA’s research reveals that many of the Groups that are most disadvantaged in terms of absolute computer and modem penetration are the most enthusiastic users of online services that facilitate economic uplift and empowerment. Interestingly, among the most likely users of on-line classes are low income users in all areas (rural, central city and urban)”.

state agencies to set up, sometimes services of on-line assistance to fill in administrative forms, sometimes information services on medical matters, statistics or others, an obligation which makes it the duty of the State to subsidize certain establishments, in particular teaching ones, in order to have access to such data, and even to diffuse them.

The improvement of certain services of general interest by the use of information and communication technologies can be seen as a fourth element for analysis in the extended notion of universal service. Thus, in America the term Public Health Service is understood to mean not only the development of and access to medical data banks but also the establishment of videoconference systems and consequently high output communication infrastructures between hospitals situated in poorly populated areas with only inadequately qualified personnel available and hospitals which by their very situation or status have the requisite personnel. Such communication networks allow the public health service to be improved.

Examples could be given for other sectors, it being very true that in many sectors of administrative life the relationship between the citizen and the authorities can be improved by telecommunications: thus the creation of on-line services of assistance in filling in administrative forms or sending forms; in the area of the public justice system, electronic systems of message certification to record complaints, to deposit or exchange final briefs.³¹

In short, it is the whole functioning of government administration and its service that can be reviewed when developing information and communication technologies.

3. Chapter: Updating laws of access to administrative documents prior to free expression in an information society

The transparency of administrative action that so-called “Freedom of Information” or “access to administrative documents” laws ensure³² has traditionally been taken as an indispensable condition for the free and clear expression of every person in a democratic society. This will be the subject of the first point.

The use of information and communication technologies gives new expression and a new significance to right of access, as will be shown in point II. Finally, it is a question of taking this as a starting point to build a coherent policy for the electronic spread of information held by the public sector. Point III itemizes the different elements of this policy in relation to the notion of public information as a universal service.

³¹For further ideas on this, see O. Lesuisse, *Le service public de la Justice et les technologies de l'information et de la communication*, a study carried out for the Ministry of Belgian Political Science, Namur, 1996, Cation, CITA 1–3.

³²In this connection, see C. de Terwangne, H. Burkner and Y. Pouillet, *Towards a legal framework for a diffusion by the public sector*, Computer Law Series, no 14, Kluwer, 1995.

3.1. *The classic meaning of right of access to administrative documents*

The freedom of expression enacted in article 10 of the European Convention for the protection of human rights and fundamental liberties presupposes, in order to be effective, both an active and a passive obligation on the part of the State, the obligation to provide information about the action that has been undertaken as well as about the action that is to be undertaken. The right of the public to be informed, understood not as a subjective right but as a democratic principle, finds its main expression in freedom of information.³³ In respect of the relations between the citizen and the authorities, this takes on a very specific meaning and signifies the power for all citizens to have access to government documents and information in the possession of the State administration. Freedom of information, a tool for ensuring openness in public and administrative institutions, by thus leading to democratic involvement, provides the necessary complement to existing regimes of representative democracy. The public debate within the social body can only take place on the basis of access to the information held by the public sector.³³ This assertion served already to establish the very principle of the Recommendation of the Council of Europe on access to information in the possession of the State authorities,³⁴ a recommendation which has found its extension in the many national laws known as “Freedom of Information”³⁵ laws. The use of the TIC has given to this right of access a new significance.

3.2. *Electronic access to administrative documents*

Under the impetus of the American National Information Infrastructure Policy, simple technologies have been set up throughout the United States, especially at the local level, which, through the use of automatic machines, allow the rights for which the law provides to be exercised more efficiently and effectively. In this way information and services (civil status, tax department, social security) can be obtained directly from the local government from one’s own home or from machines set up in different parts of the town.³⁶

³³C. de Terwangne, La liberté d’information ou le libre accès à l’information détenue par le secteur public, degree paper, University Institute of Florence, 1992, p. 3 et s., unpublished.

³⁴Recommendation of the Committee of Ministers no R (81) 19 to 25 November 1981 on access to information held by the public authorities. The European Commission is preparing a Green paper on this theme.

³⁵From the name of the American law. See: H.H. Perritt, “Federal Electronic Information Policy”, 63, Temp, L. Rev., 1990, p. 201–250. He deduces from the law of access the positive obligation for the Government to place at the disposal of the public different electronic services of information on the basis of the information collected and processed by the State (statistical, road travel, meteorological, trade register, etc. information).

³⁶The same type of initiative was set up in a town in Portugal and in certain places, in addition to supplying documents, allows documents to be printed, even tax documents to be simulated. One could also mention public libraries, which play an important educational role and can promote equality of access, notably by installing electronic machines and help services in consulting multiple sources of information.

It is no longer a question of simply providing access, the distribution of statistical, geographic, demographic, administrative, legal government data bases but of allowing an interactive electronic dialogue between the State agency and the citizens.³⁷ We can thus envisage citizens being able, through interactive networks, to question government directly on procedures that concern them and to do so without having to leave their own home (building permission, registering a trade, etc.). This also makes it possible to keep a continuous check on government in respect of citizen files.

“By taking our line of reasoning further, one might wonder if the handling of administrative data ought not to be conceived in such a way that citizens could have direct access to it from their own terminal. These questions are being discussed in the United States within the framework of freedom of access to electronic information; it is only in Canada, at the federal level, that the law is opening up the right to “computer time”, i.e. a right to program with a view to replying to a direct request for access.”³⁸

From the many developments and suggestions can be seen a determination to make substantial changes to right of access: it is no longer a question of simply ensuring the citizen's right to obtain information from his or her local government but of a greater determination, by means of technology, to transform it from the open service it has become into a better one for citizens. This development ties in with some of the ideas discussed in Section 2 regarding the notion of universal service. It leads us to consider the statutory conditions relating to the way this universal service of public information can be defined and provided, a service which derives mainly from the right of access thus reinterpreted.³⁹

³⁷Cf in this connection the Danish report, Info Society 2000, Ministry of Research, November 94; “For citizens and companies, it should be possible to send letters and information to public authorities by electronic means and receive answers the same way all public authorities establish an e-mail box to which all citizens and companies can send letters and information by electronic means.” and the Finnish report, Developing a Finnish Information Society, Helsinki, 1995, “Citizens and businesses will be given access to public sector information and facilities for everyday transactions and for the provision of customer feedback using information networks and other technical tools”. In addition to access to data held by the public sector, the “National information Infrastructure Policy” envisages what it describes as “Reengineering” of the ensemble of administrative action by the use of technologies. Under this term, it includes the offer, using electronic means, of many services traditionally provided by the State, such as the possibility of obtaining from local government forms and advice when filling out the latter, and sending them back. On this point, see H.H. Perritt, “Federal Electronic Information Policy”, 63 Temple Law Review, 1990, pp. 201–205.

³⁸H. Burkert, L “informatique du secteur publique, le secret, la transparence et le commerce, Rev. franc. d'Adm. publique, October, 1994, p. 588; by the same author, Data Protection and Access to data, in: (P. Seipel (Ed.), From Data Protection to Knowledge machines, Boston, Deventer, 1990, pp. 49–69”.

³⁹On this point see Y. Poulet, “Vers un service universel d'informations publics, Réflexions prospectives”, report submitted to the DGXII and presented to the Legal Advisory Board, Stockholm Conference 27–28 June 96, available at <http://wwwz.echo.be/legal/for/housp.stock>.

3.3. *The statutory conditions pertaining to the universal public information service*

An analysis of the many information resources collected by local government points to the recognition of numerous information products the diffusion of which would be of considerable benefit to the citizen and the market. Whether it is a question of statistical, economic, juridical, social, even cultural data bases, many examples can be found.

One senses that this manner of tackling the question of the “diffusion” of data in the public sector will lead to a complete reversal of what was foreseen in the European “Guidelines” of 1989⁴⁰ relating to the synergy between the public sector and the private sector on the information market. It is not in fact a question of restricting the activity of the State in a negative way so that market forces may operate optimally but of positively affirming that the availability of information in the possession of the public sector meets a growing need of general interest and plays a decisive role in the functioning of the information society and of adding that the synergy of the public sector and the private sector is the best guarantee of an adequate response to this need.

3.3.1. *The content of the universal service and the body responsible for specifying it*

The universal public information service is certainly a concept of changing shape and one that evolves with time; specifying the differing content calls for an open debate, under the responsibility of the government agency which, in respect of this debate, must work out the economic and social consequences that certain technological choices will have and so take care not to discriminate between those who are in possession of the information (the information haves) and those who do not have access (the information have nots).

We can then go on to specify what could, in each case, constitute the public information service. The laws governing access to administrative documents specify a minimal first step by obliging government to reply free of charge to citizens’ requests for access by providing them with a paper copy of the administrative documents relating to the request. The public information service shares the same determination to ensure the openness of administrative action but, in addition to the simple right of access with which access legislation is concerned, also sees the obligation of local government as a positive obligation to make information services available by using the appropriate technologies to ensure their wide distribution. In this connection, Perritt mentions a second rule, that one could describe as a proportionality rule. The State would be required to make the information available to citizens using the same techniques as those employed internally with its own agents. A case in point would be if the social security department uses internally a data bank of ad hoc regulations and integrates certain decision-aid systems when examining pension requests and when calculating them. Such data banks and the decision-aid

⁴⁰Guidelines for improving the synergy between the public sector and the private sector on the information market, D.G.XIII, Office of official European publications, Luxemburg, 1989.

system would also have to be accessible by on-line processing to citizens, for example in the offices of the social security department in the area.

The purpose of this second rule, one can easily see, is to place government and citizen on an equal footing when it comes to accessing information on which depends a decision made by the former in respect of the latter.

In addition to these two rules which fix a minimal content, it is for the government agency, if need be, to specify a wider content for the universal service. By government agency, we mean any democratic authority whether it operates at a European, national, regional or local level. We can in fact imagine the creation of a universal service of public information at these different levels, for example, at the local level, the creation of services of information about the decisions of local authorities, their composition, their action, etc.

3.3.2. *The operator of the universal service*

The choice of term “universal service” recently employed in connection with telecommunications by the Commission, in preference to that of “public service”, was no accident, as we pointed out above (No. 6). It was a question of giving up very clearly for once and for all the old equation public Service = public Enterprise = monopoly, without for that abandoning the characteristics peculiar to public service, namely, the laws of “continuity”, “change” and “equality”.

Respect for these laws certainly requires – and this will be the role of the debates mentioned above – that terms and conditions be drawn up which will allow the exact content of the public information service to be specified, as also the price scale, the financing and requirements tied to the continuous and universal nature of the offer.

This said, the offer of the information service will sometimes be the responsibility of state agencies, sometimes that of one or several private companies, sometimes that of a society, a mixed society, set up precisely for that purpose. No solution must be preferred in itself. In each case, an examination of budgetary requirements, of the market situation and of the service to be rendered will dictate the solution to be preferred. Thus, the task of setting up a server centre integrating different data bases will more readily be entrusted to a private company (in fact to several, each serving a given area), in view of the necessity, following an analysis of the market, of setting up a new and flexible service from the banks of disparate data. With regard to banks of legal data, we are aware of the many solutions different countries have come up with, ranging from the decision to entrust the production and distribution as a whole to government (Italian solution), to that of creating mixed societies, or that of dissociating production from distribution and reserving the former solely for government.

If it is a question of entrusting to private or mixed companies⁴¹ the task of operating such or such universal service, the authorities will ensure that the choice of

⁴¹“Yet suggesting that agencies depend upon the private sector for performing a similar distribution function with electronic information sometimes is attacked as being too deferential to the private sector” (H.H. Perritt Jr., *Federal Electronic Information Policy* (1990), *Temple Law Review* 63 (2), p. 221, referring to the works of the office of Technology Assessment, US Congress, *Informing the Nation* (1988), p. 261–270.

operator is made following a public procedure and after specifying the terms and conditions allowing the continuity of the universal service to be guaranteed, as also equality of access to the service and the fixing of affordable prices, as will be explained in point C.

3.3.3. The conditions for exploiting the universal public information service

The principles of the Open Network Provision (O.N.P.) defined in respect of telecommunications, can easily be applied to our domain.

It is question of ensuring, for one or several services the quantity and quality of which have been specified, that conditions of access, non-discrimination and prices based on costs are transparent. The service envisaged can be that provided for the end user (e.g. the consultation by a user of a bank of legal data) or the service provided for an intermediary who may then offer a value added service (e.g. a legal publisher who, in addition to the fiscal jurisprudence incorporated in the data bank set up within the framework of the universal service, might wish to integrate supplementary information; for instance, legal commentaries, telephone assistance services and on-line access to specially designed forms). In this second case, the rules of the O.N.P. are intended to stimulate competition between private operators regarding the value added services they provide, including those proposed to the operator of the universal service be public or private.

The tariffs must be progressively geared towards costs, without this excluding a “reasonable” profit. Such is the rule of the O.N.P. The question is how to identify these costs. Is it a question of including in the charge for the universal service all the costs, including data collection, borne by the state agency when setting up the information services? There is a strong temptation to make the users of the information distributed by the public sector pay the administrative running costs. The 4th guideline goes counter to this: “The price fixed should offset the costs resulting from the preparatory work and from making the service available to the private sector, but without necessarily including all the costs of collecting and processing the information, when these are needed for the everyday functioning of the state agency”. This therefore excludes both costs of collection and all the investment costs needed to ensure the running of the agency. On the other hand, those supplementary costs which involve making information available outside the agency are taken into account. We are talking, for example, of software for controlling access, acquiring additional capacity to handle massive access, and of software to make access user friendly.

We can also add that calculating costs presupposes the specification of accountancy rules that allow costs and income from the universal service to be isolated, the profit from which cannot serve to subsidize value added services. Such rules pose a problem in countries where, traditionally, State budgetary accounts globalize and produce annual statements of expenses and receipts, treating all administrative departments as one.

As for the reasonable profits made by government, it seems normal that these should be reinvested in improving the service provided for the users.

Finally, it goes without saying that the need to make the universal service accessible to all, means that prices must be affordable, and so in certain cases, keeping

tariffs low may mean temporarily financing the large investments agreed upon. There are several solutions: the universal service can be financed by the State itself or, by distinguishing the universal service rendered to the citizens from the one rendered to the intermediaries, the receipts from the latter may finance the former. It is clear that such discussions must involve serious thinking and regular assessment.

Here we encounter solutions similar to those currently being worked out in the universal service of telecommunications: the creation of a universal service fund fed by the contributions of a certain number of actors or the development of a system of access fees; the operators would be specified and obliged to provide a universal service or else the service would be put up for auction.⁴²

4. Conclusions

In this paper, we stress the role of the State, not the traditional one of the monopolistic operator providing general interest telecommunications services but a much more positive one where care is taken that everyone has at his or her disposal the means needed to become effectively involved in what we call an information society: this is the role especially assigned to the notion of universal service. This involvement can favour a new form of democracy even if the basic principles of our constitutional democracies cannot be questioned.

The notion of universal service has therefore appeared as a key concept, as the founder of a democratic information society. This concept is a call to action; the aim of which is to give everyone the means of sharing in this information society and of benefitting from it; it is an open concept whose evolutionary content must the subject of public discussion. However that may be, this concept appears as the basis

- of an access policy in public places to the electronic media;
- of a voluntarist policy to provide instruction in the use of these electronic media;
- of a policy to make available, using electronic means, information and state agency services at every level (local, regional, national, federal and international).

Apart from universal service, the electronic tool can be seen as an active way of sharing in political decision-making. In this connection, it is clear that a policy to support citizens' non-profit-making associations by allowing them, through the use of electronic means to federate around political, social, philosophical, religious, etc. options, can be one way of making the State aware, if need be, of the many different wishes of its citizens. It will also favour the use by political parties of electronic forms of communication with citizens. It must however be understood that these

⁴²In this connection, see the paper of E. Coene and J.-M. Cheffert, in which they propose a universal service funding system, Internal document of our Centre of Computer and Law Research, to appear as chapter of "la assite unitreol Engneur comunique et familiale". Chapter CR9, Kluwer 1998, November.

electronic forms of involvement can in no way lead to changes in the constitutional rules of our elective democracy but simply foster open discussion of it. No doubt rules pertaining to the way citizens obtain advice electronically will have to be worked out to meet this requirement.

In addition to these ideas on the positive role of the State, we insist on the need for consultation in defining a policy for developing information and communication technologies. Thus, specifying and exploiting the many forms of universal service, and developing new modes of access to administrative documents, must be arrived at by a dialogue involving all the interested parties.

The Electronic Highway Accord, signed in October 1995 in Canada (State of British Columbia) represents, in the words of the introduction, the result of discussions with representatives from industry, the work sector, teaching and research, government and various communities. It was therefore a joint effort in specifying the way in which the citizens of British Columbia can take advantage of the electronic highway. “All British Columbians have affordable electronic access networks and services enabling them to communicate, learn, create, work, be entertained...in an information society”.

The accord insists on the fact that the cooperation which led to the accord must be pursued and that the success of the British Columbia project requires the contribution and involvement of the different groups, organizations and communities of interest. These contributions are complementary: “The collaboration of communities, and the public and private sectors must be based on a clear understanding of their respective roles. Communities will focus on overcoming information technology knowledge and skill deficiencies, and also on championing affordability and universal access. The public sector’s focus will be on the strategic procurement, management, and application of information technologies; and on education and research. The private sector’s focus is to research, develop, and supply innovative information technology and telecommunications facilities, products, and services to meet public, consumer, and business demand”.

As for the content of the accord, it enumerates the various themes already discussed; namely, the theme of access to all electronic means of communication, that of improving public service by using new technologies, the electronic diffusion of public information, (“an informed public is essential to democracy”), the development for everyone of a technological culture through teaching, and finally the use of information highways as a means of improving dialogue between citizens and government (“the electronic highway must strengthen the democratic process by contributing to an informed and participatory constituency and by enabling a dialogue between citizens and their government”).

What more can we add? It appears from what has been said that electronic democracy is not the necessary consequence of technological development, that it is obtained as a result of the fight for openness in what the State does, for possible access to all information resources and for the use of the technological tool in the very process of political decision-making.